United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7333

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7333

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA and CAROL ABBEY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, JULE M. SUGARMAN, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York and JOHN V. LINDSAY, as Mayor of the City of New York,

Defendants-Appellees.

Appeal From The United States District Court For The Southern District of New York

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BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT

This is an appeal from an order entered by United States District Judge Charles M. Metzner on April 30, 1975. The decision is reported unofficially at 10 FEP Cases 769. A copy of the opinion is found at App. p. 49 .

QUESTIONS PRESENTED

1. Whether state and local officers sued in their official capacities are immune from suits in equity brought under 42 U.S.C. §1983?

2. Whether the Board of Education of the City of New York is immune from suits in equity brought under 42 U.S.C. §1983?

3. Whether the 1972 Amendments to Title VII of the Civil Rights Act of 1964 is to be given retroactive application to claims thereunder, made by women employees of the N.Y.C. Board of Education and Department of Social Services who were forced to take "maternity" leave at an arbitrary point in their pregnancies?

STATEMENT OF THE CASE

This action was brought on July 26, 1971, by female employees of the New York City Board of Education and the New York City Department of Social Services on behalf of themselves and other female employees in city agencies similarly situated. In their original complaint, plaintiffs challenged, on constitutional grounds, the rules and regulations of the defendant

city agencies which plaintiffs claim arbitrarily compelled pregnant women employees to take unpaid leaves of absence when they desired to, and were capable of, working beyond the mandatory leave period. Jurisdiction was initially based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3). App. p. 1 .

An amended compaint was filed on September 14, 1972, following the amendment to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.) which extended its coverage to state and local governments and boards of education. App. p. 14. Via the amendment, the plaintiffs added Title VII both as a ground for relief and as a source of jurisdiction. (The amendment also added a new plaintiff, Carol Abbey, an employee of the Board of Education who had been suspended for becoming pregnant.)Complaint ¶17, App. p. 17.

In an opinion filed April 12, 1972, Judge Motley denied both defendants' motion to dismiss and plaintiffs' motion for summary judgment, but granted plaintiffs' motion to declare this a class action, 357 F. Supp. 1051 (1972). App. p. 10.

As will be described in the Statement of Facts, infra, the defendants subsequently abandoned their mandatory pregnancy rules. Plaintiffs claims for equitable restitution, however, remain outstanding, as do possible claims for counsel fees.

On April 22, 1974, defendants moved to dismiss the action and, in the alternative, for summary judgment. App. p. 26. Plaintiff Monell, the only named plaintiff suing defendant Sugarman, cross-moved for summary judgment. App. p. 40 . In

the opinion and order dated April 30, 1974 and here appealed from Judge Metzner dismissed the complaint for lack of subject matter jurisdiction. App. p. 49.

STATEMENT OF FACTS

At the outset, it should be noted that plaintiff Monell was injured by defendants Jule Sugarman, John V. Lindsay and the Department of Social Services of the City of New York, while plaintiffs Beverly Zapata, Susan Terrall and Carol Abbey were injured by defendants Harvey Scribner and the Board of Education of the City of New York. As will appear hereinafter, there are some differences in the law relating to each of the two sets of plaintiffs, though the underlying theory of liability is the same. Too, the facts which give rise to the liability of the different defendants should be separately described.

A. Defendants Sugarman, Lindsay and Department of Social Services.

In February 1971, plaintiff Monell was employed by defendants Sugarman and Lindsay as a supervisor in the Department of Social Services. Ms. Monell wished to work until March 29, 1971. Defendants required her to begin maternity leave without pay on February 26, 1971.

Ms. Monell was notified by letter from Inez Simon, Division of Personnel Relations, Department of Social Services, Bureau of Personnel Administration, reconfirming that her request to continue work until March 29, 1971, had been denied

and indicating that the denial was based on a department policy permitting staff members to work through the seventh month of pregnancy with the approval of the Bureau Physician. The letter also noted that under city-wide leave regulations, pregnant employees are permitted to work only until the completion of the fifth month of pregnancy unless they receive "agency medical approval" and approval of the head of the agency by whom they are employed. At the time of her forced maternity leave, the policies of defendant Sugarman did not allow extensions beyond the end of the seventh month of pregnancy.

Ms. Monell has since left the employ of the defendants. She has never been compensated for her loss of pay during her illegal suspension.

B. Defendants Board of Education and Harvey Scribner.

Plaintiffs Zapata and Terrall were both suspended from work pursuant to a rule of the Board of Education requiring that pregnant employees take maternity leave at the end of their seventh month of pregnancy. Plaintiff Abbey filed suit in January, 1972, alleging that she too was forced to take leave at the end of her seventh month. Her suit was consolidated with the case of plaintiffs Terrall and Zapata by stipulation. Not until late November, 1973, did they finally discontinue the policy retroactive to September 1, 1973.

Although the Board has discontinued its challenged policy, the effects of the policy continue even now and will

continue in the future. For because they were placed on leave before they wished to stop work, many women lost tenure and salary steps, and unless they are granted relief by this Court, will never be at the salary level at which they are otherwise entitled to be. Nor, of course, have any of the affected women been compensated for pay lost due to the illegal suspensions.

I. DEFENDANTS ARE NOT IMMUNE FROM SUIT UNDER 42 U.S.C. §1983.

In holding that it was not authorized to order any of the defendants at bar to restore back pay to plaintiffs the court below relied upon City of Kenosha v. Bruno, 412 U.S. 50, (1973); Sl.Op.pp.4-5,App.pp.52-3. In City of Kenosha, supra, the Supreme Court decided that suits in equity, like suits at law, could not be brought against municipalities under 42 U.S.C. §1983 because that statute applies only to persons.*/ But City of Kenosha should not bar plaintiff's claims for equitable monetary relief insofar as they are directed against individually named defendants sued in their official capacities (i.e. defendants Sugarman, Scribner, and Lindsay); nor should it preclude relief against defendant Board of Education of the City of New York.

A. Relief is Authorizes under §1983 Against Individually Named Defendants.

Prior to City of Kenosha v. Bruno, supra. it was well established that state and city officials were subject to suits in equity under §1983 even if sued in their official capacities notwithstanding that monetary relief was sought against them. This Court so held in McMillan v. Bd of Education of the State

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*/ 42 U.S. §1983 reads as follows:

> Every person who, under color of any statute, ordinance regulation, custon, or usuage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

of New York and Edward Nyquist as Acting Commissioner of Education of the State of New York, 430 F.2d 1145 (2nd Cir. 1970). There plaintiffs sought an order directing additional expenditures for education. The defendant's motion to dismiss the §1983 aciton on the ground that the Board was not a "person" was denied because Commissioner Nyquist was named in addition to the Board of Education. See discussion at 430 F.2d 1148-9 and cases cited.

Nothing in City of Kenosha v. Bruno, supra has changed this rule. As the Supreme Court was careful to note in City of Kenosha:

> "The only defendants named in the complaints, however, were the municipalities of Kenosha and Racine."
>
> Id at 412 U.S. 512.

In his concurrence, Mr. Justice Brennan also stated the issue narrowly:

> "Nevertheless, since the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U.S.C. §1343..."
>
> 412 U.S. at 516.

Moreover, in subsequent cases the Supreme Court has continued to treat §1983 as authorizing monetary relief against governmental officials sued in their official capacities, see e.g., Cleveland Board of Ed. v. La Fleur, 414 U.S. 632 (1974); Sugarman v. Dougall 413 U.S. 634 (1973). The former case is particularly instructive because it concerned the same substantive claim raised by plaintiffs in this action, the unconsitutionality of involuntary pregnancy leave. Of course, the

Supreme Court there endorsed the claim on its merits but, more relevant here, the Court went out of its way to endorse the award of back pay to aggrieved teachers, calling it "appropriate," 414 U.S. at 638.*/ The view that the presence of individual defendants (sued in their official capacities) accounted for the favorable jurisdictional treatment in Cleveland Bd of Ed. v. La Fleur has already been adopted by the Fifth Circuit in Adkins v. Duval County School Board, 511 F.2d 690, 694-695 (5th Cr. 1975). As that court there shows this is the most logical way of reconciling the two cases (City of Kenosha and Cleveland Bd of Ed.) as well as other Supreme Court decisions.

Also especially instructive is Sugerman v. Dougall, 413 U.S. 634 (1973), in which Commissioner Sugarman, who here asserts his immunity from §1983 suits, was also a defendant. In that case he was sued by former employees who had been dismissed from Department of Social Services employ because they were aliens. They sued for reinstatement and for lost wages (see Dougall v. Sugarman, 330 F. Supp. 265, 267 (S.D.N.Y. 1971) and ultimately prevailed on the merits. Deciding the case only weeks after it decided City of Kenosha, supra, the Supreme Court saw no reason to question the propriety of the §1983 claim. Surely this is because Commissioner Sugarman was a named defendant, City of Kenosha being therefore inapposite.

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*/ The Supreme Court was referring to the order in Cohen v. Chesterfield County School Bd.; 326 F. Supp. 1159, 1161 (E.D. Va., 1971). This was a companion to Cleveland Board of Education v. La Fleur, supra.

Three cases decided since City of Kenosha in this court would also seem to require reversal of the lower court's ruling herein. In Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974) the defendant was sued "Individually and in his capacity as President of Nassau Community College" by a faculty member who sought to enjoin, on civil rights grounds, his appointment of a white Associate Dean. Defendant moved for dismissal on jurisdictional grounds, arguing the applicability of City of Kenosha along the same lines as defendants here. This court rejected the jurisdictional attack:

> "...since the complaing names Dr. Chambers and Mr. Patterson individually, which for jurisdictional purposes is sufficient to preclude the action from being classified as one against the county."
> Gresham v. Chambers, supra 501 F.2d at 689.

It is noteworthy that the Court did not quarrel with defendants' assertion that the act sought to be enjoined was performed in Chamber's official capacity, Id. The case can therefore not be distinguished from this one of the ground that Chambers was sued in his individual as well as official capacity.

And, in Blanton v. State Univ. of New York, 489 F.2d 377 (2nd Cir. 1973), the plaintiffs, who had been suspended from college sought injunctive and monetary relief under §1983. Noting that "the State University is not a 'person' within 42 U.S.C. §1983" Id., 489 F2d at 382, the Court nonetheless went on to decide the case on its merits, apparently believing that the presence of named official defendants brought the claim within §1983.

Again, in Bloeth v. Montanye, 514 2d 1192 (2d Cir. 1975) this Court had no difficulty in finding §1983 jurisdiction when an inmate sought injunctive and monetary relief against a state prison official apparently sued in his official capacity. Of course, had the inmate sued the state itself, §1983 could not have been a jurisdictional basis.

At least five other Courts of Appeals have squarely adopted plaintiff's view of this issue. See Sterzing v. Fort Bend, Ind. School Dist., 496 F.2d 92, 93 note 2 (5th Cir. 1974) (school board officials held subject to §1983 suit for back pay in their official capacity through board itself was not a "person" and thus immune); accord, Ingraham v. Wright, 498 F.2d 248, 251-252 (5th Cir. 1974); Huntley v. North Carolina State Bd. of Ed., 493 F.2d 1016, 1017 (4th Cir. 1974) (teacher, alleging unconstitutional suspension, may properly sue named officials for reinstatement and back pay under §1983 even though suit against State Board itself would not be permitted; Gay Students Org. v. Bonner, 509 F.2d 652, 655(1st Cir. 1974) ("We cannot accept the conclusion that §1983...is not available to challenge the actions of persons who are acting in their capacities as State officials."); Rochester v. White, 503 F.2d 263, 266-267 (3rd Cir. 1974) (injunctive relief against state welfare officials); Incarcerated Men of Allen County Jail v. Fair 507 F.2d 281, 287-289 (6th Cir. 1974) (award of attorney's fees granted as part of equitable relief). See also Burton v. Cascade School Dist. Union High School No. 5, 512 F.2d 850 (9th Cir. 1975) in which the Ninth Circuit upheld the propriety of a back pay award in a civil rights actions against a school

board without discussing the jurisdictional question.

In reaching its contrary conclusion the court below was persuaded by the seeming illogic of reading §1983 to permit a decree against a municipal official which would be likely to have an effect on the city treasury when no such decree could be directed against the city itself, Sl.Op. at 5-6,App. p.53-4. According to Judge Metzner this situation can be analogized to Edelman v. Jordan, 415 U.S. 651 (1974) which held that monetary relief -- even in equity -- could not be granted against a state official because of the 11th Amendment, Sl. Op. at 5-6,App. p. 53-4.

But this approach is not so logical as it may seem at first blush. One major problem with it is that its application would effectively gut §1983, thus leaving most civil rights plaintiffs without any access to the federal judiciary. For, if City of Kenosha means what Judge Metzner thinks it does then §1983 would be of no use in challenging the application of an unconstitutional state statute or regulation by state or local officers. This so contravenes the modern flow of precedent relating to federal jurisdiction that it is impossible to believe that the Supreme Court intended such a result in City of Kenosha, which did not even mention this policy problem. The explicit recognition that nothing less than the evisceration of §1983 was at stake has led other courts to reject the approach of Judge Metzner, see e.g., Ingraham v. Wright, supra, 498 F.2d at 252; Rochester v. White, supra, 504 F.2d at 266.

The second major flaw in the opinion below concerns its off-handed dismissal of the distinction between actions in equity and at law, Sl.Op. p.6,App.p.54. The distinction is of theoretical and practical importance. It ought not be forgotten that "the exclusion of municipalities from §1983 jurisdiction was based largely on a fear that municipal liability for damage awards against local officials could disrupt the functioning of local government and would impose substantial liability on municipal entities bearing no direct responsibility for the unauthorized acts of their officials (citations omitted,)" Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 288 (6th Cir. 1974) (emphasis in original).

The fears of the drafters of §1983 have no place, then, where municipal officials who have injured innocent persons by applying the laws of the municipality are directed to make whole these injured. Moreover, a decree in equity, unlike an award in damages is subject to the judicious discretion of the district judge who can, if justice warrants, temper the effect of his order on the defendant's treasury. */

The case of Incarcerated Men of Allen County Jail is relevant too because in it the Sixth Circuit explicitly rejected the analogy between §1983 and the 11th Amendment,

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*/ Plaintiff's claim for back pay unquestionably sounds in equity see, e.g. Incarcerated Men of Allen County Jail v. Fair, supra, at 288; Harkless v. Sweeney Ind. School District, 427 F.2d 319, 324 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971); Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 N. 8 (4th Cir. 1966).

507 F. 2d at 288. As that Court of Appeals there noted, the 11th Amendment broadly immunizes the states from federal court jurisdiction. Interpretations of this constitutional limit on the federal judiciary should not serve as precedent for "the limited statutory exclusion of municipalities from §1983 jurisdiction." Id. at 288.

In sum, the District Court should be reversed because its effort to strip §1983 of all vitality finds no support in the Supreme Court, this Court, or any other Court of Appeals.

B. The Board of Education of the City of New York is a "Person" Within the Meaning of §1983.

Even if reversal is not required for the reasons already discussed, the District Court clearly erred in holding that the Board of Education of the City of New York could not be sued under §1983 in its own right. The lower court's view is in disregard of this Court's decision in Lombard v. Board of Education of the City of New York, 502 F. 2d 631 (2nd Cir. 1974) a case in which plaintiff sought from ". . . the Board of Education reinstatement as a teacher and an award of all back pay due him. Id. at 502 F. 2d 632. Jurisdiction was bottomed on §1983. Indeed, the case required extensive discussion of

the scope of §1983. Were the defendant Board not subject to such actions surely the court would have so held because subject matter jurisdiction would have been lacking. Since the Board was not there sued through its officers, but in its own right, it is obvious that the dichotomy between individuals and their employing agency developed in Section A of this Point was not relied on to subject the Board to §1983. Why then did City of Kenosha v. Bruno, supra, not bar this result?

The answer is simply that unlike a state or municipality, an independent public agency does come within the meaning of the term "person" as used in §1983. This Court has recently so held in Forman v. Community Services, Inc., 500 F.2d 1246, 1255 (2nd Cir. 1974), rev'd on other grounds sub nom United Housing Foundation v. Forman, __U.S.___, 95 S. Ct. 2051 (1975).*/ The State Housing Finance Agency was subjected to §1983 jurisdiction in a suit for damages despite its protestations based on City of Kenosha. To the same effect is Escalera v. New York City Housing Authority, 425 F.2d 853 (2nd Cir. 1970), cert. denied, 400 U.S. 853 (1971).

The District Court purported to distinguish this line of cases, and in particular to distinguish Forman v. Community Services, Inc., supra.

> "...(the) case is not in point since the statute creating the State Housing Authority (sic) specifically waived governmental immunity both as to the agency and the state."
> Slip. Op., p. 5.

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*/ The Supreme Court declined to reach the §1983 issue, 95 S. Ct. at 2057 f.n. 10.

But this betrays a misunderstanding of the Forman case (and perhaps the whole §1983 issue as well) for whether an entity is a "person" under §1983 is not a matter to be decided by the state a la sovereign immunity. Rather it is a question of federal statutory interpretation and is solely within the province of the federal courts. True, the Forman court did note that the State Housing Finance Agency did not have the protection of sovereign immunity and this in the sentence following that in which §1983 was discussed, Forman v. Community Services, Inc., supra at 1255. But its treatment of the sovereign immunity issue was not otherwise related to the §1983 claim. It was necessitated instead by the agency's close relationship with the State of New York. The latter was also a defendant and had expressly asserted an 11th Amendment sovereign immunity claim, Id. at 1256. Thus it was only natural that the Forman court also disposed of the same defense as to the agency. To end the discussion we need only note that the Supreme Court understood to §1983 question to have been decided by the Circuit Court separately from the immunity issue, United Housing Foundation v. Forman, supra at 95 S. Ct. 2057 f.n. 10.

Even if sovereign immunity were somehow relevant to the §1983 problem here at issue it would not help the defendant Board of Education which has never been held immune from suit in the federal courts, see, e.g., Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2d Cir. 1974). Nor have Boards of Education been accorded immunity by the courts of New York State. For example, in Board of Ed. of Union Free

School Dist. No. 2 v. New York State Division of Human Rights, 42 A.D. 2d 49, 345 N.Y.S. 2d 93 (2nd Dept. 1973), aff'd 35 N.Y. 2d 673, 360 N.Y.S. 2d 887 (1974) it was held that local boards are properly subject to orders restoring back pay to women who were improperly suspended because of pregnancy, Id., at 345 N.Y.S. 2d 99-100.

Like the agencies in Forman v. Community Services, Inc., supra, and Escalera v. New York City Housing Authority, supra, the Board of Education of the City of New York is an entity apart from both the City and State of New York. As the New York Court of Appeals has put it:

> "The Board...is not a department of the City government, it is an independent corporate body and may sue and be sued in the corporate name (citations omitted)" - Mtr. of Divisich v. Marshall, 281 N.Y. 170 (1939).

This independence has been preserved in the current codification of the New York Education Law at §§2551-2552.

Indeed, clear evidence of the Board's separateness from the City is provided by the history of this case: Though the City abolished mandatory maternity leaves on January 19, 1973 the Board did not do so until the Fall of 1973, Sl.Op.p.4,App.A-52.

It can only have been in recognition of the Board's separate and independent existence that this court held it subject to §1983 in Lombard v. Board of Education of the City of New York, supra. No reason exists why a contrary rule should be adopted here.

II. BECAUSE THE APPELLANTS HAD A PRE-EXISTING RIGHT UNDER FEDERAL LAW NOT TO BE FORCED TO TAKE "MATERNITY" LEAVE AT AN ARBITRARY POINT IN THEIR PREGNANCIES, THEY STATED A CLAIM FOR RELIEF UNDER THE 1972 AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964. THEREFORE, THE DISTRICT COURT WAS IN ERROR WHEN IT FAILED TO APPLY THE 1972 AMENDMENTS RETROACTIVELY AND DISMISSED APPELLANTS' TITLE VII CLAIMS.

The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 [*] to include municipal government agencies and their employees within the coverage of the Act. [**] Appellants thereafter amended their complaint to state a claim under Title VII. Relying on a footnote taken out of context from a Supreme Court opinion and upon a decision by the Sixth Circuit expressly rejected by this Court, the district court held that the 1972 Amendments were not be be applied retroactively to this case. Sl.Op.pp.7-8,App.p.A55-56. And since the named plaintiffs-appellants were forced to take "maternity" leave prior to the effective date of the 1972 Amendments, the court below dismissed appellants' Title VII claims. Slip Op. p. 8. The dismissal by the court below was error.

This Court of Appeals has recently held that the 1972 Amendments to Title VII are to be applied retroactively where the right asserted under the Amendments was a right which was secured by federal law prior to the 1972 Amendments, although such right was not enforceable under Title VII. Brown v. General Services Administration, 507 F. 2d 1300 (2nd Cir. 1974), cert.

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*/ 78 Stat. 253 (1964) as amended, 86 Stat. 103 (1972); 42 U.S.C. §2000(e) et seq.

**/ 86 Stat. 103, §701(b); 42 U.S.C. §2000(e)(b).

granted ___ U.S. ___ , 95 S. Ct. 1989 (1975)[*]; Weise v. Syracuse University, ___F. 2d ___ , 10 FEP Cases 1331 (2nd Cir. 1975)[**] Accord, Koger v. Ball, 497 F. 2d 702 (4th Cir. 1974); Womack v. Lynn, 504 F. 2d 267 (D.C. Cir. 1974); Sperling v. United States, 515 F. 2d 465 (3rd Cir. 1975) Contra, Place v. Weinberger, 497 F. 2d 412 (6th Cir. 1974), cert. den. ___ U.S. ___ , 95 S. Ct. 526 (1974).[***]

In Brown, the discriminatees were federal employees whose pre-existing right was found in Executive Orders 11246,[****]

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*/ The questions presented for review on the petition for certiorari do not appear to concern the issue of retroactivity. 43 L.W. 3621, No. 74-768 (May 27, 1975).

**/ In neither Brown nor Weise did the Court explicitly state that the pre-existing right to which the 1972 Amendments were to be given retroactive application, need be a federal right. However, it appears that the Court implicitly held in Weise that the right must be federal. In Weise, at note 23, the Court alluded to, and then rejected federal Executive Order 11246, 30 Fed. Reg. 12319 (1965), 3 C.F.R. 169 (1974), as a possible source of a pre-existing right for plaintiff-appellant in Weise. In her brief to this Court, Weise could only cite state law as the source of the pre-existing right. It therefore must be assumed that this Court implicitly rejected a non-federal right as a sufficient predicate for retroactive application of a remedial federal law, such as the 1972 Amendments to Title VII.

***/ The District Court in the instant case relied on Place despite this Circuit's specific rejection of that case. Brown v. General Services Administration, 507 F. 2d at 1305.

In Place, the only court which has held the Amendments not to be retroactive, the discriminatees have petitioned the Supreme Court for a rehearing on their petition for certiorari. In response, the Solicitor General, relying on Brown, Womack and Sperling, has confessed error and urged the Court to grant the petition and vacate the judgment of the Sixth Circuit. (No. 74-116, Memorandum in Response to Petition for Rehearing, filed May, 1975).

****/ 30 Fed. Reg. 12319 (1965); 3 C.F.R. 169 (1974).

11478 */ and 5 U.S.C. §7151. 507 F. 2d at 1305. These laws state the federal policy of equal employment opportunities for federal employees.

In Weise, because there wasn't any pre-existing federal right available to the discriminatees, the Court refused to apply the 1972 Amendments retroactively.

The instant case, involving employees of institutions acting under color of state law, is controlled by Brown and distinguished from Weise. Here the women employees are claiming a right not to be forced to take a "maternity" leave at an arbitrary point in their pregnancies and to equitable relief for violations of that right. That such a right was a federal right existing prior to the 1972 Amendments to Title VII has been established by this Court in Green v. Waterford Board of Education, 473 F. 2d 632 (1974) and by the Supreme Court in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). Thus, the situation of these employees is akin to those in Brown and unlike those in Weise.

Therefore, the women employees here have a claim for relief under Title VII.

The District Court, in finding the 1972 Amendments to Title VII not retroactive in this case, found one part of a footnote from the Supreme Court's opinion in Cleveland Board of

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*/ 34 Fed. Reg. 12985 (1969); 3 C.F.R. 169 (1974).

Education v. La Fleur, supra to be "dispositive."*/ Slip. Op. p. 8. The text in the Supreme Court opinion to which the entire footnote 8 is appended is:

> [w]e granted certiorari . . . in order to resolve the conflict between the Courts of Appeals regarding the constitutionality of such mandatory maternity leave rules for public school teachers. (414 U.S. at 638)

The Court had before it for decision solely a constitutional question arising under the Fourteenth Amendment. The issue of retroactive application of the 1972 Amendments to Title VII was not before the Court for decision. In view of the District Court's dispositive reliance on the La Fleur footnote, it is appropriate to quote (at some length) from a very recent opinion of this Court admonishing against similar "dispositive" reliances.

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*/ The District Court quoted and relied upon the following portion of footnote 8 from La Fleur, 414 U.S. at 638-9:

> At the time that the teachers in these cases were placed on maternity leave, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. did not apply to state agencies and educational institutions. 42 U.S.C. §2000(e)(1) and §2000(e)(b)(1970). On March 27, 1972, however, the Equal Employment Opportunity Act of 1972 amended Title VII to withdraw these exemptions. Pub. L. 92-261; 86 Stat. 103. Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. 29 C.F.R. §604.10, 37 Fed. Reg. 6837. While the statutory Amendments and the administrative regulations are of course inapplicable to the cases now before us, they will affect like suits in the future.

We disagree with the District Court's reading of Aiello. In our view, Aiello is not decisive of the issues raised by this complaint under Title VII and the court below was in error in holding that Aiello required dismissal of the complaint as a matter of law.

At the outset of the discussion, it is well to bear in mind Chief Justice Marshall in Cohen v. Virginia (citations omitted):

> It is a maxim not to be disregarded, that general expressions, in every opinion are to be taken in connection with the case in which the expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for discussion. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Chief Justice Marshall's admonition has been repeated many times since. For example, in Armour and Company v. Wantock, (citation omitted) Mr. Justice Jackson, writing for a unanimous court, stated:

> It is timely again to remind counsel that words of our opinions are to be read in light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading. (citations omitted)

These cautions apply with particular emphasis to footnotes or other "marginalia" in Supreme Court opinions, which should be read "within the context of the holding of the Court and the text to which it is appended." (citations omitted) In view of the wide differences between Aiello and the case decided here, these warnings are particularly appropriate here.

(Communications Workers of America v. A.T.&T., ___ F. 2d ___, 10 FEP Cases 438 (2nd Cir. 1975))

The lack of relevance of the footnote relied on by the court below to the issue presented is further evidenced by the fact that four of the five circuits which have ruled on the issue of retroactivity of the 1972 Amendments failed to even allude to the footnote although each circuit's opinion post-dated La Fleur.

The one circuit which discussed the footnote was Koger v. Ball, supra. That Court held the Amendments to be retroactive and found the footnote irrelevant to this issue. This Circuit has adopted the holding of the Fourth Circuit in Koger. Brown v. General Services Administration, supra.

In Koger, in opposing retroactive application of the 197 Amendments, the federal government (which has since reversed its position, see n. 5, supra) relied on a footnote in the Fourth Circuit's opinion in Cohen v. Chesterfield County School Board, 474 F. 2d 395 (en banc, 1973), subsequently reviewed by the Supreme Court as the companion case to La Fleur. The language of the Fourth Circuit footnote (474 F. 2d 395, n. 1) is similar to the language in the Supreme Court's La Fleur footnote. (See Koger v. Ball, 497 F. 2d at 706-7, nn. 20-21).

The circuit from which the footnote apparently arose, explained it in Koger. The Court held that all that the footnote means is that Title VII cannot be the source of the employee's substantive rights prior to the 1972 Amendments. 497 F. 2d at 207. This construction is no different than appellants' position here, nor than the rule in this Circuit. See Weise v. Syracuse University, supra. As noted supra at p. 19 , the appellants' right

not to be placed arbitrarily on "maternity" leave pre-dated the 1972 Amendments. No new substantive right is claimed.

Because claims based on pre-Amendment conduct may have become stale by the effective date of the Amendments, a blanket rule of retroactive application would be manifestly unjust. See Vymetalik v. Secretary of Commerce, ___ F. Supp. ___ , 8 FEP Cases 237, 239 (D.D.C. 1974). Therefore, the courts which have applied the Amendments retroactively have required that the claim have been pending at the time of the 1972 Amendments to Title VII. The appellants in this case have met the requirement of pendency because their claim was the basis of a pending proceeding in district court at the time the 1972 Amendments became effective. Womack v. Lynn, 504 F. 2d at 269 (D.C. Cir. 1974).

Moreover, the concern with staleness is not even reached in this case because even if appellants' claim had not been pending at the time of the Amendments, appellants timely asserted a claim under the 1972 Amendments. See Clark v. Goode, 499 F. 2d 130, 132 (4th Cir. 1974) (Appellant Abbey, already a named plaintiff in the §1983 action, filed an EEOC charge within the time limits imposed by Title VII. 42 U.S.C. §2000(e)(5)(e)). The requirement of a pending proceeding for retroactivity purposes can have no relevance to a Title VII claim which is made within the Title VII period for filing charges.

Therefore, the District Court's order dismissing appellants' Title VII claims should be reversed.

III. THE CLASS CERTIFIED BY THE DISTRICT COURT INCLUDED WOMEN AFFECTED BY THE DEFENDANTS' MATERNITY LEAVE POLICIES BOTH BEFORE AND AFTER THE EFFECTIVE DATE OF THE 1972 AMENDMENTS TO TITLE VII. THEREFORE, REGARDLESS OF THE HOLDING ON THE ISSUE OF RETROACTIVITY, THE CLAIMS OF THE WOMEN AFFECTED AFTER THE 1972 AMENDMENTS SHOULD NOT HAVE BEEN DISMISSED.

The original complaint in this action, and the amended complaint, were brought on behalf of a class of women employees who were or who would be subject to defendants' arbitrary "maternity" leave policies. District Judge Motley held this action to be maintainable as a class action. 357 F. Supp. 1051, 1054 (S.D.N.Y. 1972).

The class, thus defined, includes women who were forced to take "maternity" leave prior to the effective date of the 1972 Amendments and women who were forced to take leave after the effective date of the Amendments. Assuming arguendo that the 1972 Amendments are not given retroactive application in this case, there remains in this action a post-Amendment class of affected women employees. There is no ground for dismissing their claim under Title VII. Therefore, the lower court was in error even in view of its own decision on the issue of retroactivity, when it dismissed the entire complaint.

CONCLUSION

The order of the District Court should be reversed and the case remanded for further proceedings. The appellants should be awarded costs, including attorneys' fees, on this appeal.

Respectfully submitted,

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September 22, 1975

CERTIFICATE OF SERVICE

The undersigned attorney for plaintiffs-appellants, and member of the bar of this Court, hereby certifies that on September 22, 1975, she mailed a copy of the enclosed Brief for Appellants and Appendix to counsel for defendants-appellees, Corporation Counsel of the City of New York, Municipal Building, New York, N.Y. 10007.

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